93-548

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

WILLIAM CODY KELLY, Trustee,
Petitioner,
vs.
THE STATE OF CALIFORNIA,
THE STATE OF NEVADA,
TAHOE REGIONAL PLANNING AGENCY,
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF NEVADA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does this Court's statement in *Penn Central Trans. Co. v. New York City*, 438 U.S. 104, 130 (1978) that " 'taking' jurisprudence does not divide a single parcel into discrete segments" enable a public entity to "deprive a property owner of all economically beneficial or productive use" (*Lucas v. South Carolina Coastal Comm'n*, 505 U.S. __, 120 L.Ed.2d 798, 813 (1992)) of a discrete, and legally separate, parcel of land on the basis that some use is allowed on another discrete, legally separate parcel of land, merely because the parcels were earlier part of the same larger tract?

2. In determining whether a regulatory act or course of conduct has deprived a property owner of all economically beneficial and productive use, may a court:

- equate loss of value with loss of economically beneficial or productive use, and find no compensable taking when the property in question retains some residual value, even where all economically beneficial and productive use is stultified;
- employ a standard of historical cost — no matter how remote in time — rather than current fair market value, in determining diminution of value or frustration of investment-backed economic expectations in a takings analysis; or
- refuse to find a temporary taking when a regulatory scheme denies a property owner the right to build on his or her property, or use that property in some economically beneficial or productive manner presently or in the definable future, but holds out the possibility that the owner may (but again may not) at some unidentifiable time be permitted such a use? If this question is to be adjudicated on an ad hoc basis, what are the standards and criteria that control such determination?

3. Can an interstate compact (here the Tahoe Regional Planning Compact [94 Stat. 3233]) permit a public entity (here the Tahoe Regional Planning Agency) to abrogate state constitutional rights of a citizen, under the doctrine of implied preemption, in the absence of any express or implied intent of Congress justifying such abrogation?

PARTIES TO THE PROCEEDING

Plaintiff, appellant and petitioner is William Cody Kelly, Trustee, Under Trust Dated December 12, 1962,

Defendant and respondent Tahoe Regional Planning Agency (TRPA) is the interstate governmental agency empowered by the 1969 Tahoe Regional Planning Agency Compact. The State of California and the State of Nevada were dismissed as parties defendant in an August 23, 1989 pre-trial order.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING iii

LIST OF APPENDICES viii

TABLE OF AUTHORITIES ix

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS 2

STATEMENT OF THE CASE 2

A. Petitioner William Cody Kelly Secured Permission Of Douglas County And The Tahoe Regional Planning Agency To Develop The Subject Properties For Residences 2

B. How The Tahoe Regional Planning Agency Stultified All Economically Beneficial And Productive Use Of The Properties For Nineteen Years (And Counting) After Douglas County, The Federal District Court And The TRPA Itself Gave Their Approval To Petitioners' Development Proposal, And For Eleven Years (And Counting) After The Issuance Of Building Permits 4

Page

C. Procedural History 6

1. Before The Ninth Judicial District Court Of The State Of Nevada 6

2. Before The Supreme Court Of The State Of Nevada 8

REASONS WHY THE WRIT SHOULD ISSUE . . 9

A. Introductory Statement 9

B. Petitioner Has Been Deprived Of Just Compensation By A Misapplication Of The Language In *Penn Central Transportation Co. v. City Of New York* That " 'Taking' Jurisprudence Does Not Divide A Single Parcel Into Discrete Segments"; This Phrase Has Caused Considerable Confusion And Startling Injustice In Just Compensation Cases, And Needs Revisiting By This Court. 11

1. Wrested Out Of Its Defining And Limiting Context And Treated As A Legal Doctrine For General Prospective Usage, The *Penn Central* Quotation Is Irreconcilable With The Integrated Takings Jurisprudence Of This Court 11

Page

2. The Lower Courts Are Hopelessly Divided As To The Meaning Of The Penn Central Quotation 16

3. Because The Penn Central Quotation, Taken Out Of Context, Virtually Guarantees That Many Landowners Will Be Treated Unfairly, It Should Be Clarified, Limited, Or Disapproved 19

4. The Nevada Supreme Court Reached Back Eighteen Years In Its Application Of The *Penn Central* Quotation, Ignoring The Intervening Creation Of Separate Lots Under Nevada Law, To Work A Striking Injustice In This Case 20

C. The Nevada Supreme Court Decision Ignores And Distorts This Court's Directives As To When The Constitution Requires Compensation For Deprivation Of Economically Beneficial Use, In A Manner That Not Only Worked A Striking Injustice In This Case But Is Laden With Precedential Mischief 21

Page

D. The Nevada Supreme Court Decision — Which Holds That Interstate Compacts Automatically Preempt State Constitutional Rights, Irrespective Of Congressional Intent — Ignores This Court's Preemption Teachings And Creates A Dangerous Precedent For The Citizens Who Live In Areas Affected By Interstate Compacts 26

CONCLUSION 29

PETITIONER'S APPENDIX FILED UNDER SEPARATE COVER

LIST OF APPENDICES

APPENDIX A
OPINION, SUPREME COURT OF NEVADA, DATED JULY 8, 1993 . . . . . A1

APPENDIX B
DECISION, NINTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, COUNTY OF DOUGLAS, FILED JULY 13 1990 . . . . . B1

APPENDIX C
EXPLANATORY ORDER CONCERNING THE AWARD OF COST AND UPPAWAY COVERAGE, DATED NOVEMBER 1, 1991 . . C1

APPENDIX D
FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT, DATED NOVEMBER 1, 1991 . . . . . D1

APPENDIX E
TAHOE REGIONAL PLANNING COMPACT, PUBLIC LAW 96-551 - Dec. 19. 1980. . E1

APPENDIX F
REGIONAL PLAN FOR THE LAKE TAHOE BASIN, CODE OF ORDINANCES, DATED MAY 27, 1987 . . . . . .F1

APPENDIX G
PLAT OF THE PROPOSED DEVELOPMENT G1

TABLE OF AUTHORITIES

Page

Cases

Allingham v. City Of Seattle
749 P.2d 160 (Wash. 1988) 16

American Sav. & Loan Ass'n v. Marin County
653 F.2d 364 (9th Cir. 1981). 15, 17

Andrews v. Kingsbury Gen. Improvement
84 Nev. 88, 436 P.2d 813 (1968). 20

Aptos Seascape Corp. v. County Of Santa Cruz
138 Cal.App.3d 484 (1982),
appeal dismissed, 464 U.S. 805 (1983). 17

Armstrong v. United States
364 U.S. 40 (1960). 12, 23

Averne Bay Const Co. v. Thatcher
15 N.E.2d 587 (N.Y. 1938) 22

Bauman v. Ross
167 U.S. 548 (1897) 13

Bernardsville Quarry, Inc. v. Borough
Of Bernardsville
608 A.2d 1377 (N.J. 1992). 17

Bevan v. Brandon Township
475 N.W.2d 37 (Mich. 1991),
cert. denied, 112 S.Ct. 941 (1992) 18

Ciampitti v. United States
22 Cl.Ct. 310 (1991). 18, 19

Page

Cipollone v. Liggett Group
112 S.Ct. 2608 (1992). 27

City And County Of San Francisco v.
Golden Gate Heights Investments
14 Cal.App.4th 1203 (1993),
pet. for cert. pending (No-93-274,
Aug. 18, 1993). 20

Cohens v. Virginia
19 U.S. 264 (1821). 12

Concrete Pipe & Products of California, Inc. v.
Contruction Laborers Pension Trust
for Southern California
508 U.S. __, 124 L.Ed.2d 539 (1993) 15

Deltona Corp. v. United States
657 F.2d 1184 (Fed. Cir. 1981),
cert. denied, 455 U.S. 1017 (1982). 17, 19

Elsmere Park Club Ltd. v. Town Of Elsmere
771 F.Supp. 646 (D.Del. 1991). 19

Esposito v. South Carolina Coastal Council
939 F. 2d 165 (4th Cir. 1991),
cert. denied, 112 S.Ct. 3027 (1992) 25

Federal Power Comm'n. Niagara Mohawk
Power Co.
347 U.S. 239 (1954) 12

Fidelity Federal Savings & Loan Assn. v.
De la Questa
458 U.S. 141 (1982) 27

Page

First English Evangelical Lutheran Church v. County of Los Angeles
482 U.S. 304 (1987) 18, 23, 25

Florida Lime & Avocado Growers, Inc. v. Paul
373 U.S. 132 (1963) 26

Florida Rock Ind., Inc. v. United States
791 F.2d 893 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 1053 (1987). 17, 22

Flynn v. City of Cambridge
418 N.E.2d 335 (Mass. 1981) 17

Furey v. City Of Sacramento
780 F.2d 1448 4 (9th Cir. 1986) 17

Goldberg v. City Of Rehoboth Beach
565 A.2d 936 (Dela. Sup.), *aff'd*
567 A.2d 421 (Dela. 1989). 20

Grand Forks-Trail Water Users, Inc. v. Hjelle
413 N.W.2d 344 (N.D. 1987), *appeal dismissed*, 484 U.S. 1053 (1988). 16

Griggs v. Allegheny County
369 U.S. 84 (1962). 12, 23

Hodel v. Virginia Surface Mining & Reclaimation Ass'n, Inc.
452 U.S. 264 (1981) 23

Jacobson v. Tahoe Regional Planning Agency
566 F.2d 1353 (9th Cir. 1977) 28, 29

Page

Jentgen v. United States
657 F.2d 1210 (Ct. Cl. 1981) 18, 19

Joslin Mfg. Co. v. Providence
262 U.S. 668 (1923) 29

Kaiser Aetna v. United States
444 U.S. 164 (1979) 12, 23

Kaiser Dev. Co. v. City And County Of Honolulu
649 F.Supp. 926 (D. Haw. 1986) *aff'd*
898 F.2d 112 (9th Cir. 1990). 17

Keystone Bituminous Coal Ass'n v. DeBenedictis
480 U.S. 470 (1987) 15

Kimball Laundry Co. v. United States
338 U.S. 1 (1949) 25

Kirby Forest Indus., Inc. v. United States
467 U.S. 1 (1984) 24

Lake Country Estates, Inc. v. Tahoe Regional
Planning Agency
440 U.S. 391 (1979) 28

Loretto v. Teleprompter Manhattan CATV
458 U.S. 419 (1982) 12

Loveladies Harbor, Inc. v. United States
15 Cl.Ct. 381 (1988). 17

Lucas v. South Carolina Coastal Comm'n 15, 17, 21
505 U.S. __, 120 L.Ed.2d 798 (1992) . . 22, 25, 26

Page

M & R Investment Co. v. State Dept. Transp.
103 Nev. 445, 744 P.2d 531 (1987) 20

MacDonald, Sommer & Frates v. Yolo County
477 U.S. 340 (1986) 14

Maryland v. Louisiana
451 U.S. 725 (1981) 26

McCulloch v. Maryland
17 U.S. 316 (1819). 26

Morales v. Trans World Airlines, Inc.
__ U.S. __, 119 L.Ed.2d 157 (1992) 27

Moskow v. Commissioner Of Envtl. Management
427 N.E.2d 750 (Mass. 1981) 17

Mountain States Legal Found. v. Hodel
799 F.2d 1423 (10th Cir. 1986),
cert. denied, 480 U.S. 961 (1987) 17

Naegele Outdoor Advertising, Inc. v.
City Of Durham
803 F.Supp. 1068 (M.D.N.C. 1992) 19

Nollan v. California Coastal Comm'n.
483 U.S. 825 (1987) 11, 12

Pacific Gas & Elec. Co. v. Energy Resources
Conservation & Development Comm'n
461 U.S. 190 (1983) 27

Penn Central Trans. Co. v. New York City
438 U.S. 104 (1978) 9-11, 13-21

Page

Pennsylvania Coal Co. v. Mahon
260 U.S. 393 (1922) 14, 23

Presbytery Of Seattle v. King County
787 P.2d 907 (Wash.), *cert. denied*,
498 U.S. 911 (1990) 16

Rice v. Santa Fe Elevator Corp.
331 U.S. 218 (1947) 26

Sharp v. United States
191 U.S. 341 (1903) 13

Stephans v. Tahoe Regional Planning Agency
697 F.Supp. 1149 (D.Nev. 1988). 28

Tim Thompson, Inc. v. Village Of Hinsdale
617 N.E.2d 1227 (Ill. App. 1993) 20

Twain Harte Associates, Ltd. v. County
Of Tuolumne
217 Cal.App.3d 71 (1990) 17

United States v. Causby
328 U.S. 256 (1946) 12, 13

United States v. Clarke
445 U.S. 253 (1980) 12

United States v. Dickinson
331 U.S. 745 (1947) 12

United States v. General Motors Corp.
323 U.S. 373 (1945) 25

Page

United States v. Gerlach Live Stock Co.
339 U.S. 725 (1950) 12

United States v. Grizzard
219 U.S. 180 (1911) 12, 15

United States v. Kansas City Life Ins. Co.
339 U.S. 799 (1950) 12

United States v. Miller
317 U.S. 369 (1943) 24

United States v. Petty Motor Co.
327 U.S. 372 (1946) 25

United States v. Security Ind. Bank
459 U.S. 70 (1982). 12

United States v. Welch
217 U.S. 333 (1910) 13

United States v. Westinghouse Elec. and Mfg. Co.
339 U.S. 261 (1950) 25

United States v. Willow River Power Co.
324 U.S. 499 (1945) 10

Walker v. Ware, Hadham etc. Rail Co.
12 Jur. (n.s.) 18 (1866). 23

Watson v. Memphis
373 U.S. 526 (1963) 18

Webb's Fabulous Pharmacies v. Beckwith
449 U.S. 155 (1980) 12

Page

Western Energy Co. v. Genie Land Co.
737 P.2d 478 (Mont. 1987). 16

Whitney Benefits, Inc. v. United States
926 F.2d 1169 (Fed. Cir. 1991),
cert. denied, 112 S.Ct. 406 (1991) 15

Woodbury Place Partners v. City Of Woodbury
492 N.W.2d 258 (Minn. App. 1992),
cert. denied, 113 S.Ct. 2929 (1993) 18

Constitutions

United States Constitution
art. VI, cl. 2 26
Fifth Amendment 1, 2, 7, 12
Fourteenth Amendment 1, 2, 7

Nevada Constitution
Section 8. 2

Federal Statutes

28 U.S.C. § 1257(a) 1
28 U.S.C. § 1983 1

Public Law 91-148, 83 Stat. 360 2
Public Law No. 96-551, 94 Stat. 3233 2

Page

State Statutes

California Government Code
sections 66800-66801 2

Nevada Revised Statutes 277.190 and 277.200 2

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(University of Oklahoma Press 1974) 21

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(Harvard College 1985). 23

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§ 14.01[1](1993). 13

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PETITION FOR WRIT OF CERTIORARI

William Cody Kelly, Trustee, Under Trust Dated December 12, 1962, respectfully seeks Certiorari to review the judgment of the Supreme Court of the State of Nevada.

OPINIONS BELOW

The July 8, 1993 opinion of the Supreme Court of the State of Nevada is published at 109 Nev. Adv. Op. 100 (Nev. 1993) and at 855 P.2d 1027, and is reproduced herein as Petitioner's Appendix at A1-20.

On August 23, 1989, the Ninth Judicial District Court of Nevada issued an order dismissing defendants State of California and State of Nevada, and granting partial summary judgment to TRPA. (App. A9-10) Following trial, the District Court issued its principal decision on July 13, 1990. (App. B1-102) Finally, on November 5, 1991, the District Court filed an Explanatory Order Concerning the Award of Costs and Uppaway Coverage (App. C1-9) and also entered its Findings of Fact, Conclusions of Law and Judgment (App. D1-42).

JURISDICTION

This is an action for deprivation of property without just compensation and in violation of due process of law and equal protection of the laws, thus invoking the Fifth and Fourteenth amendments to the United States Constitution, and the Civil Rights Act (28 U.S.C. § 1983). The judgment of the Nevada Supreme Court was entered on July 8, 1993. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Fifth Amendment, United States Constitution:

> ". . . nor shall private property be taken for public use, without just compensation."

Fourteenth Amendment, United States Constitution:

"Section 1 . . . nor shall any State deprive any person of life, liberty or property without due process of law . . ."

Section 8, Nevada Constitution:

> ". . . No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation having been first made, or secured . . ."

The Tahoe Regional Planning Compact (Public Law 91-148), 83 Stat. 360, created TRPA in 1969. The current (1980) version of the Compact (Public Law No. 96-551, 94 Stat. 3233) is App. E. The Compact is enacted verbatim in California Government Code sections 66800-66801 and Nevada Revised Statutes 277.190 and 277.200. The 1987, TRPA Individual Parcel Evaluation System (IPES) is reproduced verbatim, without its technical appendices, at App. F.

STATEMENT OF THE CASE

A. Petitioner William Cody Kelly Secured Permission Of Douglas County And The Tahoe Regional Planning Agency To Develop The Subject Properties For Residences

In 1966, William Cody Kelly purchased 44 acres of mostly hillside property in Glenbrook, Douglas County, Nevada, overlooking Lake Tahoe, from the heirs of prominent businessman Max C. Fleischmann. (855 P.2d. 1029;

App. A3) Mr. Kelly took title to the former Fleischmann estate as Trustee under a trust dated December 12, 1962. Mr. Kelly then sought to develop certain other parts of the Fleischmann estate as small, discrete residential parcels.[1] He retained reputable and qualified professionals to prepare a development plan that would be sensitive to environmental concerns and fully comply with applicable law.

On August 27, 1974, the Douglas County Planning Commission approved Mr. Kelly's subdivision information report. (855 P.2d 1029; App. A3) On September 24, 1974, the Douglas County Commission approved the project (39 total lots) and the appropriate tentative map, and issued an administrative permit. (855 P.2d 1029; App. A4) The project then went before the TRPA, with an extraordinary result: approval of the project (App. A3; B4)[2] followed shortly by institution of an action by TRPA in the United States District Court for the District of Nevada in an effort to annul both the County approvals and its own approval. (Civil No. R-75-130) On October 24, 1975, the District Court (Hon. Bruce R. Thompson, J.) upheld the County approval and "deemed" TRPA approval. (855 P.2d 1030; App. A3-4, B4-5) No appeal was taken, and the judgment became final.

Phase I and Phase II of the three-phases project were duly built. (855 P.2d 1029; App. A4, App. B4, B6) Phrase III consisted of lots 33 through 39 (collectively "the Properties"), sometimes referred to in the record as the "Hilltop lots" are the subject matter of this action.[3] (App. B6)

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[1] Each parcel was limited to 2,500 square feet, while the other parts of the estate were to remain common areas, and others were set aside for amenities for the residents. (App. B5) For the Court's convenience, a plat of the proposed development (Trial Exhibit 1-2) is at App. G.

[2] Approval was pursuant to the "deemed approved" provision of the 1969 Compact (Article VI(k)). How the provision resulted in a deemed approval status, is explained at 855 P.2d 1029, 1036 (App. A4).

[3] The Uppaway Development Co., incorporated in 1977, took title to most of the lots in the former Fleischmann estate, but the Properties themselves

(continued)

On December 30, 1982, Douglas County issued residential building permits for lots 33-38 (lot 39 having been left as green belt in an effort to placate TRPA), subject only to TRPA approval of the particulars of the house plans. (855 P.2d 1030; App. A6) Because each party empowered to review development of the Properties had formally given its imprimatur (TRPA as to everything but house plan particulars), that should have been the end of the matter. But it was not.

B. How The Tahoe Regional Planning Agency Stultified All Economically Beneficial And Productive Use Of The Properties For Nineteen Years (And Counting) After Douglas County, The Federal District Court And The TRPA Itself Gave Their Approval To Petitioners' Development Proposal, And For Eleven Years (And Counting) After The Issuance Of Building Permits

In the ensuing weeks and months and years, Mr. Kelly found himself beset by constantly shifting TRPA stances, (B6-7); intramural TRPA squabblings including an internal lawsuit (855 P.2d 1031; App. A7, B7); TRPA functionaries not sharing critical information with each other (see citations AOB 20); misplaced files (Ex. 1-26 and 1-33); refusals for years on end to act on applications submitted by Mr. Kelly (App. B7); passage of ordinances (81-1, Section 3.12 and 12.61) that applied **exclusively** to the Properties without notice being given to Mr. Kelly that such were being considered (Ex. 1.1); and, in August, 1983, a self-imposed TRPA moratorium (855 P.2d at 1031; App. A7, B7).

(fn. continued)
remain the property of William Cody Kelly, Trustee. (App. B14) The terms "Uppaway" and "Uppaway Estates" are used in the record, pervasively but not always precisely, to describe the larger Fleischmann parcel, the project, and improved and unimproved lots.

In spite of these events, Mr. Kelly sought conciliation rather than confrontation. He agreed not to build out lot 39 and to relocate two other lots. (35 ROA 425:8-14) He spent $169,000 on off-site improvements, including an effective infiltration system to keep runoff water out of the Lake (App. B15), in consideration of what he and others reasonably believed to be an understanding with TRPA that would permit him to proceed with full development of the Properties; but once again, there was no TRPA quid for Mr. Kelly's quo. (App. B15) Final resolution appeared impossible — even though TRPA, through its Senior Planner Gordon W. Barrett, conceded that the detailed plans for the Properties were in "substantial conformance" with the prior approvals given. (34 ROA 210:23-220:22)

TRPA's purpose in all of this, seems to have been to deprive Mr. Kelly of the benefit of the County Permits and District Court "deemed approved" judgment, and to require him to comply — as if he had no judgment at all — with all ordinances TRPA had enacted to control residential development. The first such enactment, dating from August 25, 1981, was TRPA Ordinance 81-5 (855 P.2d 1030, n.4; App. A5); 81-5 was succeeded by the Individual Parcel Evaluation System (IPES), a component of the 1987 plan. (App. B7)[4]

The court below recognized that IPES is a *de facto* growth control law which affects not only residential growth in the Tahoe basin but also "indirectly controls other facets of travel and development in the basin" as well. The Court noted that "no new subdivision lots have been approved in the basin since 1982." (App. B79)

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[4] That there was more than a modicum of cynicism in this tactic is demonstrated by the concession at trial and the subsequent holding of the trial court (see *post*) that the "deemed approved" judgment took the Properties out of the strictures imposed by IPES. The trial court was critical of TRPA for having hidden agendas (App. B68), as well as for managerial shortcomings. (App. B79)

TRPA had thus prevented residential development specifically authorized by law for nineteen years and counting. Unless Mr. Kelly is able to develop the Properties, they will remain idle without econonically beneficial or productive use. Pursuant to both the Douglas County Zoning Ordinance (Ex. 39; 35 ROA 497:16-20; 35 ROA 402) and the recorded Covenants, Conditions and Restrictions[5] the only legally permissible use of the Properties is residential.

At trial, a TPRA expert conceded — and the District Court formally found — that under the formula used to determine right to build, Mr. Kelly may never be allowed to build residences on the Properties. (App. B32, B66)

C. Procedural History

1. Before The Ninth Judicial District Court Of The State Of Nevada

On July 24, 1987 (App. B7), twelve years after the United States District Court confirmed his right to develop the Properties, and five years after he submitted detailed house plans for each of the Properties to TRPA for a lot-by-lot review of construction particulars (App. B15), Mr. Kelly sued TRPA, the State of Nevada and the State of California, in the Ninth Judicial District Court of the State of Nevada in and for the County of Douglas. (Case No. 18325).[6] Mr. Kelly alleged claims under the United States and Nevada Constitutions, and the Federal Civil Rights Act. On August

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[5] "Residence Lots: Each residence lot shall be used as a residence for a single family, and for no other purposes." (Ex. 1-8, p. 10)

[6] The immediate trigger for the lawsuit was the June, 1986 TRPA promulgation of goals and policies classifying the Properties as unbuildable because of nonconformance to soil standards (Bailey coefficients), in spite of the fact that a primary purpose of the lot changes made by Mr. Kelly was to insure that the Properties fully conformed to soil standards. (35 ROA 434:8-17; Exs. 1-47 and 1-50)

23, 1989, the State defendants were dismissed. (App. B8)

In its decision filed July 13, 1990, the District Court (Hon. Charles M. McGee, District Judge) found that (1) while "confusing to the average person and in the grand scope of things . . . [t]he regulatory system predicated upon IPES is valid . . . ." (App. B51); (2) "[A]s long as the benefit received by the property from the ordinance is *direct* and *substantial* and the burden imposed is *proportional*, the TRPA can force landowners like Mr. Kelly to postpone their building plans for a *reasonable period* . . . ." (App. B85); (3) Mr. Kelly is not entitled to just compensation under the Fifth and Fourteenth amendments" (App. B89);[7] and (4) "only routine aspects of the 1987 plan and ordinances apply to Mr. Kelly, because Uppaway's 'deemed approved' status grandfathers land coverage allocations and because effective mitigation measures already in place cause no just reason for further impeding the buildout of his planned unit development." (App. B100)

In its later judgment, the trial court thus dismissed Mr. Kelly's Nevada constitutional claims:

> "As federal law, the regional plan adopted by the TRPA preempts state law and state constitutional provisions. Accordingly, any claims asserted by the plaintiff based upon Nevada's Constitutional provisions should be dismissed." (App. D20)

Significantly, the Court also concluded that:

(1) "It is difficult, then, if not absurd, to avoid calling the effect of the TRPA's code of ordinances on the Uppaway hilltop anything other than a temporary

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[7] In a comment critical to the thrust of this Petition, the Court stated that for purposes of determining whether Mr. Kelly is entitled to compensation, it "doesn't matter" whether Mr. Kelly lost money, recaptured his investment or did "better than that." (App. B88-89) This echoed the introductory comment (App. B10) that "not too much attention is given to testimony involving Mr. Kelly's investment decisions and realizations."

appropriation or taking for a public purpose." (App. B84) (This is a somewhat astonishing statement in view of the result reached.)

(2) "[I]t is . . . sensible and fair to force Tahoe planners and governments to honor their previous Court ordered commitments to William Kelly." (App. B101)

(3) "He [Kelly] has proven that he poses the Lake no harm." (App. B101)[8]

On November 5, 1991, the District Court awarded TPRA $241,836.69 costs and $7,500 fees (App. C1-9; D1-24) and entered judgment. (App. D1-24).

2. Before The Supreme Court Of The State Of Nevada

Both parties appealed.[9] After extensive briefing (the principal briefs totaled 368 pages), the Nevada Supreme Court issued its July 8, 1993 opinion (855 P.2d 1027; App. A1-20), in which it sustained the trial court against Mr. Kelly's challenge. The Court also stated that it did "affirm the 'deemed approved' status," but modified that holding to require Mr. Kelly to comply with all TRPA standards and regulations, including IPES. (855 P.2d at 1036-37; App. 19)[10]

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[8] The most striking thing about the District Court opinion is the Court's perception of what was before it: the future of Lake Tahoe. *See, e.g.*, App. B3, where the Court noted that its decision "impacts upon the future of the Tahoe Regional Planning Agency, and perhaps even upon the future of Lake Tahoe". This theme persisted throughout.

[9] TRPA challenged the specific relief granted Mr. Kelly under the "deemed approved" holding.

[10] The language purporting to affirm in part is illusory; it created a *de facto* reversal, leaving Mr. Kelly with a slight land coverage variance which may yet be put at risk. The Nevada Supreme Court did not point to any language in either Judge Thompson's order or Judge McGee's order

(continued)

In language pertinent to this petition, the Nevada Supreme Court held that there was no taking because the Properties retained substantial value, and that "Uppaway must be viewed as a whole, not as thirty-nine individual lots when determining whether Kelly has been deprived of all economic use," quoting language at *Penn Central*, 438 U.S. 130 that "[t]akings jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated." (855 P.2d at 1034-35; App. A15)[11] The Court affirmed without comment the trial court's dismissal of Mr. Kelly's Nevada Constitutional claims.

REASONS WHY THE WRIT SHOULD ISSUE

A. Introductory Statement

This case is not about environmental protection. And most particularly, it is not about preservation of Lake Tahoe or the Tahoe Basin. Society, through its elected and appointed officials, has the power and obligation to act responsibly and even sensitively, in dealing with natural assets such as Lake Tahoe. The ultimate question this case presents is

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justifying its interpretation of "deemed approved" nor could it. With respect, the Court below — ignoring any troublesome questions of jurisdictional cognizance — simply overruled the 18-year old final decision of the Federal District Court on an unabashedly result-oriented basis. *See* 855 P.2d 1036; App. A18-19.

[11] Curiously, in view of the irreconcilable TRPA concession and the trial court finding, the Nevada Supreme Court held that most of Mr. Kelly's lots "are expected to receive approval in the next few years," and that if the IPES lot line regulations are adjusted downward — this has never occurred, as Mr. Kelly demonstrated to the Nevada Supreme Court in evidence from TRPA minutes that the Court refused to consider (855 P.2d at 1037; App. A20) — the other lots may be built out as well. (855 P.2d 1035; App. A15-16)

whether the costs of public benefits derived from preservation are to be equitably distributed as required by the just compensation clause. *See United States v. Willow River Power Co.*, 324 U.S. 499, 502 (1945).

For William Cody Kelly, this case is about deliberate deprivation — without compensation — of his right to develop and beneficially use the Properties for eighteen years (with no end in sight).

This case is also about misuse of this Court's language, particularly the language from *Penn Central* quoted *ante* at p. 9, taken out of a restricting context and employed as a weapon to deprive a citizen of his constitutional rights.

Finally, this case is about the cavalier misuse of the federal preemption doctrine. The precise issue presented here — whether an interstate compact may preempt the state constitutional rights of citizens without an express or implied congressional intent to that end — is one of first impression and is of great importance to the millions of people who live in areas affected by interstate compacts. The Nevada courts gave this question short shrift, simply decreeing that the Compact automatically preempts state constitutional rights. Express congressional intent is to the contrary.

Such cursory analysis is especially troublesome here: The Compact unmistakably shows that Congress did *not* intend to preempt state constitutional claims. It provides in a severability clause that if the "Compact shall be held contrary" to the constitutions of either California or Nevada," it shall nonetheless remain "in full force and effect as to the remaining State and in full force and effect as to the State affected as to all severable matters." Art. X(a); App. E38. This language makes sense only if the Compact does not supersede or preempt state constitutional provisions.

This Court's corrective intervention is sorely needed.

B. Petitioner Has Been Deprived Of Just Compensation By A Misapplication Of The Language In *Penn Central Transportation Co. v. City Of New York* That " 'Taking' Jurisprudence Does Not Divide A Single Parcel Into Discrete Segments"; This Phrase Has Caused Considerable Confusion And Startling Injustice In Just Compensation Cases, And Needs Revisiting By This Court

1. Wrested Out Of Its Defining And Limiting Context And Treated As A Legal Doctrine For General Prospective Usage, The *Penn Central* Quotation Is Irreconcilable With The Integrated Takings Jurisprudence Of This Court

In 1978, in *Penn Central Trans. Co. v. City of New York*, 438 U.S. at 130, this Court said that " '[t]aking' jurisprudence does not divide a single parcel into discrete segments. . . ." This phrase (hereafter the *Penn Central* quotation) has a splendid aphoristic quality, and unsurprisingly was instantly embraced by the bar representing land regulatory agencies. It has since become invested with a life of its own, as a supposed doctrinal foundation for the assertion that partial regulatory takings need not be compensated.

But there is more to sound adjudication than an advocate's ability to fasten onto a helpful phrase. Taken beyond the factual context in which it was uttered, the *Penn Central* quotation creates clear conflict with the very takings jurisprudence it invokes.[12] To use an obvious example, in *Nollan v. California Coastal Comm'n.*, 483 U.S. 825 (1987), the taking *did* divide the subject parcel into segments: the

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12 Apart form the context, discussed presently in the text, it is also significant that the *Penn Central* quotation, aside from its own *ipse dixit*, contains no citation to any prior authority, whether to this Court's prior decisions, or otherwise. This is so for the best of reasons: no authority supporting such an unqualified proposition exists.

uncompensated *Nollan* taking was partial: (a) it was a taking of an easement (i.e., qualitatively partial), and (b) the easement area extended over only fraction of the Nollans' parcel (i.e., quantitatively partial). Still no "jurisprudence" stood in the Court's way of finding it a taking within the meaning of the Fifth Amendment (483 U.S. at 841-842).[13]

Much of this Court's taking jurisprudence — and probably most of its inverse condemnation case law — is comprised of partial taking cases.[14] Each of those cases necessarily involved the taking of a discrete "segment" of property. But whether direct or inverse, a partial taking is no less a taking,[15] and it requires compensation for the part taken, and for the diminution in value of the remainder (less, of course, any special benefits). That is long-settled hornbook eminent domain law. *United States v. Grizzard*, 219

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[13] Many years ago, Chief Justice Marshall cautioned:

> It is maxim not to be disregarded, that general expressions in every opinion, are to be taken in connection with the case in which those expressions are used. *Cohens v. Virginia*, 19 U.S. 264, 399 (1821).

These words fit this situation as if written for it.

[14] *See, e.g., Loretto v. Teleprompter Manhattan CATV*, 458 U.S. 419 (1982) (cable easement); *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155 (1980) (temporary taking of use of money [interest]); *United States v. Security Ind. Bank*, 459 U.S. 70 (1982) (taking of security interest by discharge in bankruptcy); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (admission of public into private marina); *Griggs v. Allegheny County*, 369 U.S. 84 (1962) (avigation easement); *Armstrong v. United States*, 364 U.S. 40 (1960) (materialmen's liens); *Federal Power Comm'n. Niagara Mohawk Power Co.*, 347 U.S. 239 (1954) (riparian rights); *United States v. Kansas City Life Ins. Co.*, 339 U.S. 799 (1950) (flooding); *United States v. Gerlach Live Stock Co.*, 339 U.S. 725 (1950) (taking of use of spring freshets flowing down mountains and watering rangeland); *United States v. Dickinson*, 331 U.S. 745 (1947) (flooding easement); *United States v. Causby*, 328 U.S. 256 (1946) (avigation easement).

[15] While there are "important and legal differences between an inverse condemnation suit and a condemnation proceeding" (*United States v. Clarke*, 445 U.S. 253, 255 (1980)), apart from the government's concession of liability in an eminent domain proceeding, these differences are procedural.

U.S. 180, 184-85 (1911); *United States v. Welch*, 217 U.S. 333, 338-339 (1910); *Sharp v. United States*, 191 U.S. 341, 351-354 (1903); *Bauman v. Ross*, 167 U.S. 548, 574 (1897).

As the leading treatise puts it:

> 'All the issues relevant to an entire taking are similarly relevant to a partial taking.' [4A Nichols on Eminent Domain, § 14.01[1]. p. 14-2 (1993).]

United States v. Causby, 328 U.S. at 264 is instructive. There, the landowner sought compensation for a partial taking (of an avigation easement). The government resisted liability on the grounds that operation of its aircraft was within its regulatory powers (*id.* at 260), and argued that no compensation should be awarded unless the operation of its aircraft were so intrusive as to deny the owner *all* of the affected land. (*Id.* at 261-262) This Court disagreed:

> 'There is no material difference between the supposed case [of total deprivation] and the present one, except that here enjoyment and use of the land are not completely destroyed. But that does not seem to us to be controlling.' [*Id.* at 262.][16]

Accordingly, if sought to be read literally outside its factual context, the *Penn Central* quotation finds no support in taking jurisprudence, and indeed is contrary to the basic tenet of that very jurisprudence.

How then can the *Penn Central* quotation be correct? The answer to that question lies within *Penn Central* itself. In *Penn Central*, this Court stressed that regulatory takings must be viewed on an ad hoc, case-by-case basis. (438 U.S. at 124) Though the "taking issue" has inspired much contentious polemics in recent years, that analytical approach is unremarkable, because at the very birth of regulatory taking

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[16] The Court went on to note that a partial taking by the glide path "might reduce a valuable factory site to grazing land, an orchard to a vegetable patch, a residential section to a wheat field" [*id.*]. The fact that some use would remain did not make the partial taking a non-taking.

jurisprudence, Justice Holmes admonished that ". . . this is a question of degree — and therefore cannot be disposed of by general propositions." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922). *Mahon* itself was a partial regulatory taking (of mineral rights).

Penn Central is consistent with this doctrinal approach. The plaintiff in *Penn Central* made what turned out to be a dispositive concession, namely that in its regulated condition, the Grand Central Terminal was producing a reasonable return. (438 U.S. at 129, n.26) Thus Penn Central was unable to argue that its use and enjoyment of its property was *unreasonably* interfered with. On the contrary, Penn Central's concession led it into the unpersuasive posture of implying that it was entitled to something more than a reasonable return, or that it was entitled to exploit its property — not just reasonably, or consistently with its reasonable, investment-backed expectations — but to its *fullest* extent. This Court disagreed. (438 U.S. at 131-32, 136)[17]

Once these aspects of *Penn Central* are kept in mind, the phrasing that "takings jurisprudence does not divide a parcel into segments" and that "this Court focuses . . . both on the character of the [government] action and on the nature and extent of the interference of the parcel as a whole" (438 U.S. at 130) makes perfect contextual sense. Penn Central's concession that it was deriving a reasonable return from the Grand Central terminal resulted in a dispositive Court holding *that never reached the unnecessary inquiry of what are the taking criteria when the owner is not permitted to derive*

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[17] *Penn Central* thus adumbrated the explanation in *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 353 n.9 (1986) that the Takings Clause does not protect a landowner's hope of pursuing grandiose developments. Put another way, only reasonable expectations are protected by law — unreasonable ones are not.

a reasonable return from his property.[18]

This historical analysis seems to leave no doubt as to what the Court was about: retention of concededly reasonable return on the regulated property is no taking. But if one attempts to read into the *Penn Central* quotation categorical, independent doctrinal attributes, the result is confusion, and the creation of an unsound basis for overzealous arguments that a partial taking does not require compensation which it plainly has at least since 1911 when *Grizzard* was decided by this Court.

In terms of the more discrete inquiry at bench — whether the *Penn Central* quotation may be applied to vacant land, and deprive the owner of all use of a substantial part of it without compensation — the same analysis emphatically demands a "no" answer. It lends no support to the astonishing notion that by imposition of confiscatory regulations the government can simply take any part of a private landowner's holding it chooses, without any compensation whatever, as long as it does not strip the owner of everything. *See, e.g., American Sav. & Loan Ass'n v. Marin County*, 653 F.2d 364 (9th Cir. 1981); *Whitney Benefits, Inc.*

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[18] The only other case in which this Court has repeated the *Penn Central* quotation — *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 498 (1987) — involved a similar situation. Just as in *Penn Central*, the regulation at issue in *Keystone* allowed the owners to make a reasonable return on their property. *Keystone*, 480 U.S. at 498-499 ("petitioners have not come close to satisfying their burden of proving that they have been denied the economically viable use of [their] property"). Tethered to the facts from which it arose, *Keystone* therefore likewise makes analytical sense. When removed from its precise setting, however, the *Keystone* language has produced the same analytical confusion and unfairness as the *Penn Central* quotation has. In fact, this Court suggested as much in *Lucas*, 505 U.S. at __; 120 L.Ed.2d at 813 n.7.

The *Penn Central* quotation was paraphrased in *Concrete Pipe & Products of California, Inc. v. Contruction Laborers Pension Trust for Southern California*, 508 U.S. __, 124 L.Ed.2d 539, 577-78 (1993). In this ERISA/MPPA case, however, this Court specifically stated that the *Lucas* mode of analysis, controlling here, was inappropriate. (*Id.* at 577)

v. United States, 926 F.2d 1169 (Fed. Cir. 1991), *cert. denied*, 112 S.Ct. 406 (1991).

2. The Lower Courts Are Hopelessly Divided As To The Meaning Of The Penn Central Quotation

Just two terms ago Justice Scalia observed that "uncertainty" surrounding the meaning of the *Penn Central* quotation had fostered "inconsistent pronouncements by the Court." *Lucas*, 505 U.S. __; 120 L.Ed.2d at 813 n.7. Further, there is no consensus among the lower courts as to what it means. Further, and unhelpfully, courts typically recite the quotation like a mantra with no explicating analysis.

Illustrative cases may be divided into four general groups.

First, some cases have found that "the parcel as a whole" constitutes any property interest that state law recognizes as separate and protectible.[19] For example, in *Western Energy Co. v. Genie Land Co.*, 737 P.2d 478, 482-84 (Mont. 1987) the Montana Supreme Court held that the "parcel as a whole" consisted of a separate mineral estate that was specifically protected under state law.[20]

Second, other cases have avoided the hard-and-fast rule implied by the *Penn Central* quotation, and have instead

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[19] As the North Dakota Supreme Court put it in *Grand Forks-Trail Water Users, Inc. v. Hjelle*, 413 N.W.2d 344, 346-47 (N.D. 1987), *appeal dismissed*, 484 U.S. 1053 (1988), the *Penn Central* quotation means only that to effect a taking a regulation must do "more than regulate one particular future use of property while leaving available to the property owner all other uses . . . ."

[20] Interestingly, in *Allingham v. City Of Seattle*, 749 P.2d 160, 163 (Wash. 1988), the Washington Supreme Court applied this same analysis to hold that a Seattle "Greenbelt Ordinance," which forced plaintiffs to maintain seventy percent of their land as open space, effected a taking. Only two years later, however, *Allingham* was overruled as being inconsistent with *Penn Central*. *Presbytery Of Seattle v. King County*, 787 P.2d 907, 914-15 (Wash.), *cert. denied*, 498 U.S. 911 (1990).

determined the relevant parcel for takings purposes as a multi-faceted factual inquiry. *E.g., American Sav. & Loan*, 653 F.2d at 368-72; *Loveladies Harbor, Inc. v. United States*, 15 Cl. Ct. 381, 391-93 (1988); *Florida Rock Ind., Inc. v. United States*, 791 F.2d 893, 904-05 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 1053 (1987); *Kaiser Dev. Co. v. City And County Of Honolulu*, 649 F.Supp. 926, 947-48 (D. Haw. 1986) *aff'd* 898 F.2d 112 (9th Cir. 1990); *Twain Harte Associates, Ltd. v. County Of Tuolumne*, 217 Cal.App.3d 71, 85-88 (1990); *Aptos Seascape Corp. v. County Of Santa Cruz*, 138 Cal.App.3d 484, 495-97 (1982), *appeal dismissed*, 464 U.S. 805 (1983).

Third, still other cases have read the *Penn Central* quotation to mean that to effect a taking, a regulation must take every bit of value the property ever had. *E.g., Mountain States Legal Found. v. Hodel*, 799 F.2d 1423, 1430-31 (10th Cir. 1986), *cert. denied*, 480 U.S. 961 (1987); (grazing rights on land suited only for grazing); *Furey v. City Of Sacramento*, 780 F.2d 1448, 1453 n. 4 (9th Cir. 1986) (sewer rights); *Moskow v. Commissioner Of Envtl. Management*, 427 N.E.2d 750, 752-53 (Mass. 1981); (dredging rights); *Flynn v. City of Cambridge*, 418 N.E.2d 335, 339-40 (Mass. 1981); (condo owners right to occupy own unit); *Bernardsville Quarry, Inc. v. Borough Of Bernardsville*, 608 A.2d 1377, 1388-89 (N.J. 1992) (quarry rights on land suited only for mining).

Fourth, some courts, such as the court below, have applied the *Penn Central* quotation even more broadly. These courts hold that the "parcel as a whole" constitutes *all* property the landowner has *ever* owned in a certain geographic area.[21] *E.g., Deltona Corp. v. United States*, 657 F.2d 1184, 1191 (Fed. Cir. 1981), *cert. denied*, 455 U.S. 1017 (1982); (10,000 acres originally purchased by the landowner);

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[21] This, of course, is the rule this Court described as "extreme" and "unsupportable" in discussing the lower court decision in *Penn Central* itself. *See Lucas*, 505 U.S. at ___; 120 L.Ed.2d at 813 n.7.

Jentgen v. United States, 657 F.2d 1210, 1213 (Ct. Cl. 1981) (80 acres originally purchased); *Ciampitti v. United States*, 22 Cl.Ct. 310, 319-21 (1991) (45 *non-contiguous and legally separate* acres of property); *Bevan v. Brandon Township*, 475 N.W.2d 37, 41-43 (Mich. 1991), *cert. denied*, 112 S.Ct. 941 (1992) (two legally separate lots purchased at different times).

Finally, one reading of the *Penn Central* quotation is so expansive as to defy categorization. In *Woodbury Place Partners v. City Of Woodbury*, 492 N.W.2d 258, 261 (Minn. App. 1992), *cert. denied*, 113 S.Ct. 2929 (1993), the Minnesota Court of Appeals held that *Penn Central*'s "parcel as a whole" language meant that a regulatory taking could not be found unless a regulation *permanently* took every property the owner had ever possessed. In doing so, the court explained that the "temporary taking" doctrine from *First English* was inconsistent with *Penn Central*'s language, and should be construed "narrowly," so as not to override the supposedly fundamental principle established in *Penn Central*. *Id.* at 262.[22]

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[22] Although *Woodbury Place Partners* pushes constructional whimsy almost to parody, it underscores what a fair reading of these cases in the aggregate, and indeed the entire body of land use case literature in recent years, witnesses. Courts as a rule are much more diligent in following the principle of deference to regulating entities than they are in enforcing the just compensation clause. The District Court in this case spoke of "just how far the Courts will go to protect a legislative body's police power." (App. B59) Courts sometimes seem oblivious to this Court's admonition that "it is obvious that vindication of conceded constitutional rights cannot be made dependant upon any theory that it is less expensive to deny than afford them." *Watson v. Memphis*, 373 U.S. 526, 537 (1963).

One of the byproducts of the anti-compensation movement is the demonization of developers, particularly in polemical secondary literature, as the perceived enemy of the environment. But this pejorative assault gives a distorted picture of reality, since oppressive land use regulations impact not just developers but millions of property owners of modest means as well by sharply reducing housing supplies and unsurprisingly kiting prices. The reasons that developers appear disproportionately as litigants is that they are the ones with standing, and the costs of this type of litigation

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3. Because The Penn Central Quotation, Taken Out Of Context, Virtually Guarantees That Many Landowners Will Be Treated Unfairly, It Should Be Clarified, Limited, Or Disapproved

When the *Penn Central* quotation is isolated from its defining context and pushed to extremes — as was done in many of the cases discussed above — it becomes a tool that allows government to seize land without paying the owner a single dime.

In *Deltona Corp.*, 657 F.2d at 1191, the Court of Claims held that the government could permissibly destroy the value of **2000 acres** of property without compensation, since many of the acres originally purchased retained economic value. Similarly, in *Jentgen v. United States*, 657 F.2d at 1213, the Court of Claims refused to require compensation where the regulation at issue had rendered 60 of plaintiff's 80 acres worthless. Building upon *Jentgen*, the Court of Claims held in *Ciampitti v. United States*, 22 Cl.Ct. at 319-21, that a regulation did not go "too far" even though it rendered plaintiff's 14 acres valueless, because landowner was allowed to keep 31 **non-contiguous and legally separate** acres.[23]

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are enormous. Nothing illustrates this as compellingly as the fact that Mr. Kelly thus far has paid out (or owes) over $400,000 for on and offsite improvements and TRPA costs and fees — and this figure does not include his own court costs and attorney's fees — with nothing to show for it.

Ironically, this Court's correct insistence that these cases be decided on an ad hoc basis inadvertently contributes to the problem. It makes regulators bolder and courts less accountable than they would otherwise be.

To use a phrase that has gained currency in recent years, landowners are facing a very uneven playing field. This Court's help is needed now to level it to constitutional evenhandedness.

[23] *Accord Naegele Outdoor Advertising, Inc. v. City Of Durham*, 803 F.Supp. 1068, 1073-74 (M.D.N.C. 1992) (no taking where regulation deprived property owner of 65% of business); *Elsmere Park Club Ltd. v. Town Of Elsmere*, 771 F.Supp. 646, 653 (D.Del. 1991) (no taking where regulation deprived apartment owner of ability to rent 39 out of

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Perhaps the most inequitable result occurred in *City And County Of San Francisco v. Golden Gate Heights Investments*, 14 Cal.App.4th 1203, 1209 (1993), *pet. for cert. pending* (No-93-274, Aug. 18, 1993). There, the court held in an *eminent domain* action that the City needed only to pay the landowner for five of the fourteen lots it had appropriated from him. Why? Because the *Penn Central* "parcel as a whole" language would have allowed the City to achieve the same result by simply passing a regulation that rendered the other nine lots worthless even though there was no such regulation. *Id. Golden Gate Heights* is a total negation of the just compensation clause.

4. The Nevada Supreme Court Reached Back Eighteen Years In Its Application Of The *Penn Central* Quotation, Ignoring The Intervening Creation Of Separate Lots Under Nevada Law, To Work A Striking Injustice In This Case

In its misapplication of the *Penn Central* quotation, the Nevada Supreme Court stated that "Uppaway must be viewed as a whole, not as thirty-nine individual lots when determining whether Kelly has been deprived of all economic use." (855 P.2d at 1035; App. A15) The problem is that what the Court was addressing is indisputably — and since at least 1975 has indisputably been — "thirty-nine individual lots," each duly created and constituted under Nevada law. *See M & R Investment Co. v. State Dept. Transp.*, 103 Nev. 445, 449, 744 P.2d 531 (1987); *Andrews v. Kingsbury Gen. Improvement*, 84 Nev. 88, 89-90, 436 P.2d 813 (1968). The Court thus aligned itself with those courts that have taken the

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approximately 200 apartments); *Tim Thompson, Inc. v. Village Of Hinsdale*, 617 N.E.2d 1227 (Ill. App. 1993) (no taking where regulation destroys one out of three parcels owned); *Goldberg v. City Of Rehoboth Beach*, 565 A.2d 936, 944-45 (Dela. Sup.), *aff'd* 567 A.2d 421 (Dela. 1989) (no taking where regulation deprived landowner of one of two contiguous lots).

extreme position (*see post*) that if separate parcels were historically part of the same larger tract, the *Penn Central* quotation somehow precludes recovery.[24]

C. The Nevada Supreme Court Decision Ignores And Distorts This Court's Directives As To When The Constitution Requires Compensation For Deprivation Of Economically Beneficial Use, In A Manner That Not Only Worked A Striking Injustice In This Case But Is Laden With Precedential Mischief

In *Lucas*, this Court noted that the "rhetorical force" of the traditional "deprivation of all economically feasible use" standard exceeds its precise usefulness. *Lucas*, 120 L.Ed.2d at 798 n.7. In view of the ad hoc method of resolution in this area, this may be inevitable. But just because black-letter standards are flexible does not mean that anything goes. This Court can profitably interdict distortions of its teachings and in the process eliminate much needless litigation. This case presents three such examples.

First, the Nevada Supreme Court in effect casually substituted the word "value" for the word "use" in the *Lucas*

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[24] The injustice of this approach is readily apparent. With only a moment's reflection, its irrationality is also clear. It reduces easily to a *reductio ad absurdum*. Example: Los Angeles County and its immediate surroundings until relatively recently consisted of a few Mexican land grant ranchos. All were large, and some were enormous: Simi consisted of 113,009 acres, Santiago de Santa Ana of 78,941 acres; La Puente and eight others consisted of over 40,000 acres. Beck and Haase, "Historical Atlas of California," p. 37 (University of Oklahoma Press 1974); *see also* Robinson, "Ranchos Become Cities" (San Pasqual Press 1939). The land that constituted some of these ranchos now supports hundreds of thousands of residents. Could a California regulating entity go back in time, identify one of these ranchos as a "single parcel" under *Penn Central*, and preclude all further development? According to the Nevada Supreme Court, and a few other courts, the answer is apparently "yes." (This example is by no means an historical anomaly; a modern day-analogue is the King Ranch in Texas, which spans several counties.)

formula, leading to its conclusion (855 P.2d at 1034-35; App. A14-15) that no compensation was due because, *inter alia*, the Properties retained value.[25] But land always retains some residual market value; the most draconian regulation never completely negates all value. The impact of stringent regulation may cause value to plummet to a fraction of former value, but there will always be someone willing to buy the property, if to do no more than hold and wait for a possible change in the political climate or controlling law that might lead to some economically productive use.[26] *See, e.g., Florida Rock*, 791 F.2d at 896.

If there can be a regulatory taking only when all value is destroyed, a taking would never occur. This Court should leave no doubt that when it says "use" it means "use" and the fact that some value remains — as it inevitably will — does not make the constitutional transgression disappear.

Second, the Nevada Supreme Court reached back 27 years, and — with no adjustment for inflation, return, or real increase in value — used historical cost (the initial 1966 cost to Mr. Kelly) in its investment-backed expectations analysis.

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[25] This improper substitution also offered a springboard for the Nevada Supreme Court to undertake the precise type of reciprocity of benefits analysis (855 P.2d at 1035; App. A16) this Court found to be unrealistic and essentially meaningless in cases such as this where a landowner is deprived of all economically beneficial uses. *Lucas*, 120 L. Ed. 2d at 814.

[26] As Professor Laurence Tribe aptly put it, "forcing someone to stop doing things with his property — telling him you can keep it, but you can't use it — is indistinguishable, in ordinary terms, from grabbing it and handing it over to someone else." Tribe, "American Constitutional Law," at 460 (1978) Professor Tribe understates the problem. In a very real sense the person who keeps title to his property but is denied all beneficial use — the precise situation in the case at bench — is worse off than the person whose property is grabbed and given to another: the owner who keeps title retains (1) the obligation to maintain the property, (2) tort liability for misadventures that might occur on the premises and (3) the privilege of paying ad valorem taxes. *See Averne Bay Const Co. v. Thatcher*, 15 N.E.2d 587, 592 (N.Y. 1938).

(855 P.2d at 1035; App. A16)[27] This analysis was inappropriate here *ab initio* in view of the *Lucas* categorical imperative. But in some cases where not all use is frustrated, the just compensation clause is nonetheless appropriately invoked to " 'bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole' " (*First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 318-319 (1987), quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)),[28] investment-backed expectation analysis may be needed.

But relying on quarter-century old historical data, without ameliorating adjustment for inflation, interest or other real-world factors, is patently unfair.

Tolerance of this constitutional subterfuge will lead to citizens suffering identical impairment under a single ordinance, being treated radically different by virtue of the happenstance as to when their respective properties were purchased, thus raising serious equal protection problems. A landowner who bought property during the late-1980's

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[27] *See, e.g., Hodel v. Virginia Surface Mining & Reclaimation Ass'n, Inc.*, 452 U.S. 264, 294-95 (1981) and *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979).

[28] *See Griggs v. Allegheny County*, 369 U.S. 84, 88-90 (1962) stressing the government's obligation to acquire by purchase or condemnation what land it needs, and not cast the burden of the true cost of the public improvement on a more or less randomly chosen land owner, under the guise of regulation. That insight goes back to *Pennsylvania Coal Co. v. Mahon*, 260 U.S. at 415, where Justice Homes pointedly noted that the government is entitled only to such rights in property that it chooses to acquire, and it is not entitled to confiscate the balance on the grounds that the public wants it very much. This principle is firmly entrenched in Anglo-American jurisprudence: "The public can have no rights springing from injustice to others." *Walker v. Ware, Hadham etc. Rail Co.*, 12 Jur. (n.s.) 18 (1866). *See also* Michelman, *Property, Utility, And Fairness: Comments On The Ethical Foundations Of Just Compensation Law*, 80 Harv. L. Rev. 1165, 1192-93 (1967); R. Epstein, *Takings: Private Property And The Power Of Eminent Domain*, Ch. 5 at 57-58 (Harvard College 1985).

inflationary peak would enjoy protections his neighbor, who acquired his property in the depths of the depression, or by gift or bequest, is anomalously denied. Takings law does not accommodate this type of random subjectivity, nor should it. Only current fair market value is a fair standard. Only current fair market value can fulfill the Constitutional imperative that the "owner is to be put in as good position pecuniarily as he would have occupied if his property had not been taken." *United States v. Miller*, 317 U.S. 369, 373 (1943). And, only current fair market value is reconcilable with the unbroken line of cases requiring compensation to be determined based on the "fair market value of the property on the date it is appropriated . . . 'the time of the taking.' " *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 9-10 (1984), quoting *Miller* at 374.

Third, the Nevada Supreme Court denied Mr. Kelly just compensation for a temporary taking on the ground that the IPES system offered a vehicle for eventual development of the Properties. Never mind (1) that at trial TRPA conceded, and the District Court found, that the Properties may never be developed; (2) that no new subdivision lots had been approved under IPES since 1982; and (3) the District Court found that "[i]t is difficult . . . if not absurd, to avoid calling the effect of the TRPA's code of ordinances on the Uppaway hilltop anything other than a temporary taking for a public purpose" (App. B84). If this sort of evasion is tolerated, and regulating entities can avoid compensation altogether by the simple act of promulgating some system or other telling owners of stultified properties that in the sweet bye and bye some use may be allowed, the guarantee of the just compensation clause is stripped of meaning.

And finally, even where some use is eventually permitted, there comes a time where the law says that a period of enforced idleness is of sufficient duration to require compensation. At the time the Supreme Court of Nevada issued its

opinion, Mr. Kelly had been deprived of all use of the Properties for (depending on the which of several possible triggering dates is selected) 11 to 19 years. These are multiples of periods this court has recognized as sufficient to constitute temporary takings; *see, e.g., United States v. Westinghouse Elec. and Mfg. Co.*, 339 U.S. 261, 262 (1950); *Kimball Laundry Co. v. United States*, 338 U.S. 1, 3 (1949); *United States v. Petty Motor Co.*, 327 U.S. 372, 374 (1946); *United States v. General Motors Corp.*, 323 U.S. 373, 375 (1945). One surmises that it is no coincidence — although it is astonishing — that the Nevada Supreme Court did not even cite *First English* in which this Court reaffirmed "that 'temporary' takings, which, as here, deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation." *Id.* at 318.[29] This Court held that under the *First English* facts, "invalidation of the ordinance without payment of fair value for the use of the property during this period time would be a constitutionally insufficient remedy." (*Id.* at 322) The period of the alleged temporary taking in *First English* was eight years. The period between the impairing regulation and the decision of this Court in *Lucas* was four years.[30]

Thus, this Court has made it crystal-clear that *even where the imposition of the governmental servitude leaves some significant private uses to the owner*, that does not make the partial taking any less a taking, for which compensation is required. Mr. Kelly may do nothing whatever with his vacant land for the foreseeable future. Thus — in spite of

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[29] It is all the more astonishing since the District Court considered *First English* at some length, particularly at App. B81-84 (although not for its temporary taking discussion).

[30] *Lucas* also cites with approval a Fourth Circuit case construing the South Carolina Beachfront Management Act in a manner suggesting a two-year period is sufficient. *Id.* at 798 n. 4, citing *Esposito v. South Carolina Coastal Council*, 939 F. 2d 165, 168 (4th Cir. 1991), *cert. denied*, 112 S.Ct. 3027 (1992).

the facile "distinction" offered by the Nevada Supreme Court (855 P.2d at 1033-34; App. A13), this issue is contolled by *Lucas*.

D. The Nevada Supreme Court Decision — Which Holds That Interstate Compacts Automatically Preempt State Constitutional Rights, Irrespective Of Congressional Intent — Ignores This Court's Preemption Teachings And Creates A Dangerous Precedent For The Citizens Who Live In Areas Affected By Interstate Compacts

The trial court's ruling (App. D20) — affirmed by the Nevada Supreme Court without comment — that the Tahoe Regional Planning Compact impliedly preempted *all* state Constitutional claims evinces a complete misunderstanding of the preemption doctrine, was highly unfair to Mr. Kelly, and creates a particularly dangerous precedent.

Although this Court has yet to address the preemptive effect of an interstate compact, the general principles that govern federal preemption are familiar. For more than 170 years, it has been settled that federal law is the "supreme law of the land" [U.S. Const. art. VI, cl.2], and preempts conflicting state laws. *McCulloch v. Maryland*, 17 U.S. 316 (1819); *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). But as this Court has repeatedly cautioned, a finding of preemption represents an extreme intrusion into state sovereignty, and courts should accordingly exercise great restraint in applying the doctrine. *See, e.g., Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 144 (1963); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).[31] In

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[31] Justice Stevens, writing for the Court, recently put the matter this way:

> Consideration of issues arising under the Supremacy Clause starts with the assumption that the historic police powers of the States are not to be superseded by the federal act unless that is the clear and manifest purpose of Congress. *Cipollone v.*

(continued)

any situation, moreover, the "purpose of Congress is the ultimate touchstone of preemption analysis." *Cipollone v. Liggett Group*, 112 S.Ct. 2608, 2617 (1992).

Sometimes, Congress evinces this clear and manifest purpose to preempt by expressly including a provision in the statute itself. *See, e.g., Morales v. Trans World Airlines, Inc.*, __ U.S. __, 119 L.Ed.2d 157, 167 (1992). If no express provision exists, an intent to preempt may be inferred only where a particular state law directly conflicts with a Congressional enactment [*Pacific Gas & Elec. Co. v. Energy Resources Conservation & Development Comm'n*, 461 U.S. 190, 204 (1983)], or where a state law intrudes on a field so completely and totally occupied by federal law "as to leave no room for the States to supplement it." *Cipollone*, 112 S.Ct at 2617; *quoting, Fidelity Federal Savings & Loan Assn. v. De la Questa*, 458 U.S. 141, 153 (1982).

Curiously, neither the trial court nor the Nevada Supreme Court inquired at all into Congressional intent. If either court had, they could not have reached the result they did. It is difficult to imagine a federal law that more jealously guards state sovereignty than the Compact does.

As noted *ante*, the Compact in a severability clause provides that if any of its provisions are "held contrary to the constitution" of either California or Nevada, the reviewing provisions shall remain the force in both states and *all* provision shall remain in force in the state whose constitution is not offended. (App. E38) In view of this provision, the decisions below are untenable: why would Congress bother to provide for the situations in which the Compact runs afoul of provisions that supposedly cannot arise?[32]

(fn. continued)
Liggett Group, 112 S.Ct. 2608, 2617 (1992) (Citations omitted.)

[32] But if there was any remaining doubt, the Compact's structure also demonstrates that it was intended to preserve state laws, not abrogate them. In fact, this Court recognized the numerous state law attributes of the
(continued)

To find preemption the Nevada courts applied without analysis a Ninth Circuit case that held:

> Although the TRPA must be considered an agency of the contracting states, it operates under the aegis of federal law. Consequently, causes of action based on the state constitutional provisions must fail because the Compact, as federal law, preempts state law.

Jacobson v. Tahoe Regional Planning Agency, 566 F.2d 1353, 1358 (9th Cir. 1977), *rev'd in part, aff'd in part sub. nom, Lake County Estates, Inc. v. TRPA*, 440 U.S. 391 (1979). *See also, Stephans v. Tahoe Regional Planning Agency*, 697 F.Supp. 1149, 1152 (D.Nev. 1988).

But *Jacobson* suffers from the same flaw as the decisions below: its superficial slide across the surface of the problem ignores the Congressional intent behind the Compact. *Jacobson's ipse dixit* to the contrary, "federal law" does not "preempt state law" unless Congress so wills. And because of the failure of each of these courts — the courts below and the Ninth Circuit — to even attempt the necessary analysis, their decisions defy the Compact itself.

(fn. continued)
Compact when it construed an earlier, but similar, version. *See Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 399-401 (1979). For example, the Compact enables any action to enforce or challenge its provisions to be maintained in the Nevada and the California state courts. Compact, Art. VI(j); App. E28. Further, voting members of TRPA are appointed exclusively by the Nevada and California state legislatures. Compact, Art. I(a)(1-3); App. E5-6. The federal government appoints only a single-non-voting member to TRPA. Compact Art. X, sec. 3; App. E39. TRPA meetings "must be open to the public to the extent required by the law of the State of California or the State of Nevada, whichever imposes the greater requirement." Compact, Art. III(d); App. E9. Finally, TRPA personnel standards must "conform insofar as possible to the regulations and procedures of the civil service of the State of California or the State of Nevada . . . ." Art. IV(b); App. E12.

The decision below renders the promise of federalism a hollow shell, and it is also be fundamentally inconsistent with *Joslin Mfg. Co. v. Providence*, 262 U.S. 668, 676-77 (1923), where this Court held that state courts could interpret their own takings clause provisions more broadly than this Court interprets the corresponding federal provisions.

This Court is the only court that can bring the law back into line. The Ninth Circuit has already spoken to the issue (albeit superficially and incorrectly) in *Jacobson*; other federal appellate courts will not likely decide cases involving the Compact. This case presents the Court with a unique opportunity to resolve the question in an expeditious and efficacious manner.

CONCLUSION

This petition squarely presents an opportunity to appropriately limit and otherwise clarify prior language of this Court, particularly the *Penn Central* quotation, that has engendered conflicts among courts, and is being persistently (and on occasion wilfully) misused. There is a great need to set right an apparently spreading misapprehension as to applicability of the takings clause to partial regulatory takings. The petition also squarely presents this Court with an opportunity to clarify the preemptive scope of interstate compacts, and to prevent the misapplication of that doctrine as well.

The case at bench, and the myriad of similar cases, do not present a simplistic dichotomized development versus preservation issue. The underlying question they present is, rather, whether the costs inevitably generated by regulations intended to secure or preserve public benefits are to be distributed fairly throughout the public as the constitution requires, or randomized on the basis of happenstance property ownership. Regulators and reviewing courts need to be pointedly reminded to stop trifling with the just compensation clause,

and implement both its letter and spirit. Mr. Kelly respectfully urges this Court to grant this petition, which offers a vehicle particularly suited to that end.

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Respectfully submitted,

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